PUBLIC MATTER – NOT DESIGNATED FOR PUBLICATION

Filed December 3, 2009

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	Nos**. 04-O-14383; 06-O-10960**
	)	
DANIEL DAVID DYDZAK,	)	**OPINION ON REVIEW**
	)	**AND ORDER**
A Member of the State Bar.	)	
	)	

BY THE COURT:[1]

This is Daniel David Dydzak's fifth disciplinary proceeding in less than 10 years. In 1998, he was suspended for 30 days for wide-ranging misconduct in five client matters, including failure to: promptly pay client funds, maintain client trust account funds, communicate with a client, return client files, return unearned fees, and cooperate with the State Bar investigation. He received a private reproval in 2002 when he neglected to report $3,500 in sanctions for filing a frivolous appeal. Also in 2002, Dydzak was publicly reproved for failure to show respect for the court by making a scurrilous remark about a judge while leaving the courtroom. In 2004, he received a one-year stayed suspension and two years' probation for engaging in the unauthorized practice of law (UPL) while on suspension from his first discipline.

In this proceeding, the hearing judge recommended disbarment after finding Dydzak culpable of serious professional misconduct in four separate matters. Dydzak is appealing, asserting a plethora of procedural, substantive and constitutional issues.[2]

[1] Before Remke, P. J., Epstein, J. and Purcell, J.

[2] Dydzak filed no less than 21 pleadings in the Hearing Department, the Review Department and the Supreme Court, all of which were denied. Those pleadings raised the same

Dydzak's latest misconduct reflects a lack of understanding of his professional responsibilities, even after prior disciplines should have motivated him to reflect upon, and conform to, the ethical parameters of the legal profession. Upon our de novo review (*In re Morse* (1995) 11 Cal.4th 184, 207), we find clear and convincing evidence supporting the hearing judge's culpability findings, as well as additional culpability and aggravation. We conclude that Dydzak should be disbarred because additional discipline will not adequately protect the public.

I. PROCEDURAL HISTORY

Dydzak was admitted to the practice of law in California on December 17, 1985, and he has been a member of the State Bar of California since then. On August 11, 2006, the Office of the Chief Trial Counsel of the State Bar of California (State Bar) filed a notice of disciplinary charges (NDC) in case numbers 04-O-14383, 05-O-00017 and 05-O-02000. On December 27, 2006, it filed another NDC in case number 06-O-10960. The matters were consolidated, and Dydzak was charged with a combined total of 11 counts of misconduct. The case was tried on July 24-25, 2007, and submitted on October 25, 2007. The decision was filed on August 5, 2008.[3]

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procedural and constitutional issues that he resurrects in this plenary appeal. Any issues not specifically addressed here have been considered and rejected as moot or without factual and/or legal basis.

[3] Rule 220(b) of the Rules of Procedure of the State Bar of California specifies that the decision should be filed within 90 days of submission, but the rule "is neither mandatory nor jurisdictional, but directory." (*In the Matter of Petilla* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 231, 246.) Nevertheless, adherence to the rule is important because it serves the dual purpose of public protection when a respondent is culpable of misconduct and prompt vindication of a respondent's professional reputation when no culpability is found.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CASE NUMBER 04-O-14383

1. LaFlamme Matter

Thomas LaFlamme hired Dydzak to substitute as his attorney of record in a civil lawsuit that LaFlamme had filed in the Los Angeles County Superior Court. After Dydzak presented LaFlamme's case, the court granted the defendant's motion for a non-suit as to all causes of action. On September 23, 2003, the Superior Court judge signed and filed an order directing that judgment be entered in favor of the defendant.

On November 20, 2003, Dydzak filed a notice of appeal with an incomplete Case Information Statement (CIS) in the Court of Appeal. On January 4, 2004, the Court of Appeal returned the CIS to Dydzak because he failed to attach a copy of the Superior Court's order, and instructed him to file a corrected CIS by February 18, 2004. Dydzak then filed three separate applications for extensions of time. In its order granting Dydzak's third request for additional time, the Court of Appeal again directed him to file a completed "Case Information Sheet, with the appealable order" no later than May 6, 2004.

Instead of timely filing the completed CIS as ordered by the Court of Appeal, Dydzak filed a pleading on May 13, 2004, entitled "Plaintiff's/Appellant's Notice of Abandoning Appeal Without Prejudice to Refile New Notice of Appeal Once Judgment is Entered."[4] He then waited six more months to file a motion for entry of judgment in the Superior Court.[5] Before Dydzak

[4] Dydzak claims that during the entire time he was attempting to perfect LaFlamme's appeal, he was unaware that the Superior Court had filed its order directing entry of judgment on September 23, 2003. When asked why he did not simply go to the Superior Court to ascertain if the order had been filed or to obtain an endorsed-filed copy of the final order to attach to the CIS, he stated: "Well, I don't believe . . . that I am required to have such a heavy burden to visit the court file."

[5] It appears that the clerk of the court did not officially enter the judgment in the records until December 8, 2004, after Dydzak filed the motion for entry of judgment.

had time to file a second notice of appeal, LaFlamme terminated him on December 30, 2004. At that point, the filing of LaFlamme's appeal had been delayed for more than a year.

Count 1 – Failure to Perform Competently (Rules Prof. Conduct, rule 3-110(A))[6]

Rule 3-110(A) provides that an attorney must "not intentionally, recklessly, or repeatedly fail to perform legal services with competence." Despite numerous orders of the Court of Appeal requiring him to file a completed CIS "with the appealable order," Dydzak made no effort to do so within the time specified by the Court of Appeal. His failure to perfect his client's appeal, which languished for more than a year, clearly constitutes a failure to perform with competence.

2. The Cofield Matter

On November 30, 2001, Brad and Maria Cofield, husband and wife, hired Dydzak to file a lawsuit against their former business associates. The Cofields verbally agreed to a contingency agreement and gave Dydzak $1,500 as a retainer and cost advance with the remaining costs to be deducted from any recovery. Six months later, on May 30, 2002, Dydzak filed a complaint in the Los Angeles County Superior Court. On November 27, 2002, he filed a first amended complaint.

A year and a half after the Cofields retained him, Dydzak sent them a letter on June 10, 2003, stating that they needed to sign a contingent fee agreement and to advance an additional $1,000 "to continue on the case, and for both of you to agree in writing that all costs incurred in the case . . . will be paid by both of you." Dydzak concluded by stating: "If both of you will not agree to [these two] foregoing [conditions], I respectfully request that you substitute me out of the case. If not, I will file a motion to withdraw shortly." The Cofields refused to sign an

[6]Unless otherwise indicated, all further references to rules are to these Rules of Professional Conduct of the State Bar.

agreement or pay the additional costs, stating in a letter dated August 4, 2003: "This is not the agreement we made when you took the case." Their letter also criticized Dydzak's handling of the case. Despite his previous statement, Dydzak did not file a motion to withdraw.

Dydzak failed to appear at the Cofields' final status conference on January 8, 2004, at which the Superior Court set a trial date of January 20, 2004, and issued an order to show cause (OSC) why Dydzak should not be sanctioned for his failure to appear. Dydzak had actual notice of the OSC hearing, which was scheduled for the same date as the trial. On January 20, 2004, Dydzak did not appear. The Cofields were present, however, and only then learned from the Superior Court judge that Dydzak had filed a request for dismissal on January 15, 2004. According to Dydzak, the Cofields authorized him to settle and dismiss the case in exchange for a waiver of costs. The Cofields credibly testified that they never gave Dydzak permission to settle or dismiss their lawsuit.[7] They paid subsequent counsel approximately $18,000 to vacate the dismissal of their case. Eventually, the Cofields represented themselves at trial, obtaining a partial verdict in their favor.

Count 2 – Failure to Perform Competently (Rule 3-110(A))

Dydzak willfully violated rule 3-110(A) by failing to appear at the final status conference, and by settling and dismissing the Cofields' case without their consent. And he did so without any assurance that the Cofields' interests were protected. Although his settlement and dismissal of the Cofields' case without their authority constitute a failure to perform with competence, as charged in Count 2, this conduct is more appropriately charged in Count 3 as

[7] The Cofields' testimony was corroborated by a declaration by Dydzak filed in the Superior Court in support of the motion to vacate the dismissal in which he attested, under penalty of perjury: "This case was dismissed based upon mistake, inadvertence and excusable neglect on my part due to the that that I was under the mistaken impression that my clients, Brad Cofield and Maria Cofield, authorized me to dismiss the case because of their unavailability and their lack of financial resources to prosecute the case through trial. In hindsight, my impression was incorrect. . . ." (Emphasis in the original.)

moral turpitude. Accordingly, we dismiss this count with prejudice as duplicative. (*Bates v. State Bar* (1990) 51 Cal.3d 1056, 1060 [duplicate allegations of misconduct serve little, if any, purpose in State Bar proceedings.)

Count 3 – Moral Turpitude (Business and Professions Code Section 6106)[8]

The hearing judge found that Dydzak willfully violated section 6106 when he settled and then dismissed the Cofields' case without their consent. We agree. The overreaching involved in resolving a lawsuit without the client's approval constitutes a deliberate breach of a fiduciary duty owed to the client and involves moral turpitude per se. (*In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195, 208.)

3. The Sylver Matter

In 2003, Dydzak represented Marshall Sylver and Sylver Enterprises, Inc. (collectively the Sylver defendants) in a lawsuit in the U. S. District Court for the Central District of California. Dydzak filed an opposition to the plaintiff's motion to strike the Sylver defendants' pleadings on October 3, 2003, and attached a supporting declaration, attesting under penalty of perjury that he was "duly admitted to practice law before all of the Courts of the State of California." On October 20, 2003, he appeared at the hearing on the motion to strike. At the time Dydzak filed the pleadings and appeared at the hearing, he was suspended from the practice of law for failure to pay costs in a prior disciplinary matter.

Count 4 – Unauthorized Practice of Law/Holding Out as Entitled to Practice (§§ 6068, subd. (a), 6125, and 6126)

The hearing judge, citing *Benninghoff v. Superior Court* (2006) 136 Cal.App.4th 61, dismissed Count 4 because he found that Dydzak may not be disciplined based on his conduct in federal court either for UPL or for holding himself out under sections 6125 or 6126. Under the

[8] Unless otherwise indicated, all further statutory references are to the Business and Professions Code. Section 6106 makes the commission "of any act involving moral turpitude, dishonesty or corruption . . . a cause for disbarment or suspension."

facts of this case, we agree with the hearing judge that Dydzak may not be disciplined under section 6125, even though he practiced law in the federal court while he was suspended by the State Bar. (*Surrick v. Killion* (3d Cir. 2006) 449 F.3d 520, 530-531 [suspension from membership from a state bar does not necessarily lead to disqualification from a federal bar]; cf. *In the Matter of Wells* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 896, 902-903 [discipline may be imposed for UPL in federal court when matter involves settlement of state law claims].)

However, section 6126 is broader than section 6125 and prohibits an attorney who is suspended by the State Bar from holding himself out as entitled to practice in California. We find Dydzak culpable of a violation of section 6126 for representing in his declaration filed in the federal court that he was duly admitted to practice before all California courts. While we do not seek to restrict or assume jurisdiction over Dydzak's practice before the federal courts, the California Supreme Court may discipline a practitioner for acts committed in federal court that " ' reflect on his integrity and fitness to enjoy the rights and privileges of an attorney' " in California. (*In the Matter of Gadda* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 416, 420, citations omitted.) "Barring the [s]tates from disciplining their bar members based on misconduct occurring in federal court would lead to the unacceptable consequence that an attorney could engage in misconduct at will in one federal district without jeopardizing the state-issued license that facilitates the attorney's ability to practice in other federal and state venues." (*Canatella v. California* (9th Cir. 2005) 404 F.3d 1106, 1110-1111.) We thus find Dydzak culpable of violating a California Supreme Court order that prohibited him from holding himself out as entitled to practice law in California in violation of section 6126.

B. CASE NUMBER 06-O-10960

1. The Thronson Matter

On March 24, 2003, Frances Thronson retained Dydzak to represent her in a personal injury case against Trader Joe's. Shortly thereafter, she gave him $250 for fees and costs. In

April 2003, Dydzak told Thronson that he would file a complaint within five to seven days and send her a copy once he had filed it. Thronson called five or six times during the following weeks, asking Dydzak's assistant for a copy of the complaint.

In May 2003, Dydzak left a voicemail message for Thronson falsely stating that he had filed "papers" against Trader Joe's. In fact, he did not file the complaint until one year later in May 2004. In the meantime, he repeatedly evaded Thronson's continued requests for a copy of the complaint and for a status conference, all the while professing that the complaint had been filed. Finally, Dydzak met with Thronson on May 7, 2004, the date Dydzak actually filed the complaint. He still did not provide a copy of the complaint, leaving her to believe that he had filed it the previous year as he had assured her. At the May 7, 2004, meeting, Thronson signed a retainer agreement with Dydzak.

On September 7, 2004, Dydzak failed to appear at a case management conference (CMC) in Thronson's case. The Superior Court issued an OSC directing Dydzak to file a declaration no later than October 1, 2004, showing why Thronson's case should not be dismissed for his failure to (1) appear at the CMC, (2) file proof of service of the complaint, (3) comply with the California Rules of Court regarding CMCs, and (4) timely prosecute her case. The court set the OSC hearing for October 7, 2004. Dydzak filed his declaration in response to the OSC four days late on October 5, 2004, and then failed to appear at the hearing. As a result, the Superior Court dismissed Thronson's case on October 7, 2004. Dydzak did not inform Thronson that her case had been dismissed, let alone the reasons for the dismissal.

Dydzak waited more than five months to file a motion to set aside the dismissal, which the Superior Court denied in April 2005. He then filed a motion for reconsideration, which the court denied in July 2005. On October 25, 2005, Dydzak filed a notice of appeal and -- more than a year after the dismissal – he finally advised Thronson that her case had been dismissed by

the Superior Court. Even then, he neglected to disclose the reasons for the dismissal. On December 8, 2005, the Court of Appeal filed an order dismissing the appeal because Thronson was in default.

On January 17, 2006, Thronson sent a letter to Dydzak detailing the history of their association and indicating that she "would be willing to call it quits if [she] received $10,000 in compensation for a variety of ills. I could then let the matter go." Dydzak responded by letter on January 26, 2006, falsely stating that he had previously advised her of the Court of Appeal's dismissal. He further falsely claimed that "I explained to you that the costs [to set aside the dismissal] were expensive. You failed to timely remit to me required monies for said appeal, resulting in the dismissal of the appeal." Dydzak insisted in his letter that Thronson send him $800 to cover costs so that he could "pursue the appeal by moving to reinstate same." He also stated that he had previously informed Thronson that she "had major difficulties of proof in [her] case." Thronson credibly testified that she was never advised about the cost of appeal or that her case lacked merit. In his January 26 letter, Dydzak did not advise her that the deadline to seek reinstatement had already expired on December 23, 2005, or that the Court of Appeal's order dismissing the appeal was final as of January 16, 2006.

Count 1 – Failure to Perform Competently (Rule 3-110(A))

Without question, Dydzak willfully violated rule 3-110(A) when he repeatedly failed to competently perform legal services for Thronson. His disregard of his fiduciary duty to protect her interests, as detailed above, was egregious.

Counts 2, 3, 4 and 5 -- Moral Turpitude (§ 6106)

Dydzak's many misrepresentations to Thronson about the status of her case, as set forth in Counts 2, 3, 4, and 5, constitute moral turpitude in violation of section 6106. His statements involved both affirmative misrepresentations (e.g., his repeated claims that he had filed the

complaint against Trader Joe's), and nondisclosures (e.g., his repeated failure to inform Thronson of the dismissals by the Superior Court and the Court of Appeal and the reasons for the dismissals). In finding moral turpitude, " '[n]o distinction can . . . be drawn among concealment, half-truth, and false statement of fact. [Citation.]' [Citation.]" (*In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166, 174.) In the interest of economy, all of Dydzak's misrepresentations could have been properly charged as one count, but we nevertheless find that each violation of section 6106 set forth in counts 2, 3, 4, and 5 was established by clear and convincing evidence.

Count 6 – Failure to Advise of Significant Developments (§ 6068, subd. (m))

Dydzak willfully violated section 6068, subdivision (m), which requires that attorneys keep their clients advised of significant developments. He failed to timely tell Thronson about the dismissal of her case, the reasons for that dismissal, and the consequences of the dismissal of her appeal. However, the hearing judge correctly gave no additional weight for the violation of section 6068, subdivision (m) because Dydzak's failure to inform Thronson was a basis for establishing culpability for misrepresentation in Counts 2, 3, 4, and 5. Therefore, Count 6 is dismissed as duplicative. (*Bates v. State Bar*, *supra*, 51 Cal.3d at p. 1060.)

Count 7 – Failure to Respond to Client's Inquiries (§ 6068, subd. (m))

We find clear and convincing evidence that Dydzak willfully violated section 6068, subdivision (m), which requires attorneys to promptly respond to reasonable client inquiries. He repeatedly failed to promptly respond to numerous reasonable status inquiries from Thronson during a two-and-one-half-year period from May 2003 through June 2006.

III. MITIGATING AND AGGRAVATING CIRCUMSTANCES

A. MITIGATION

Dydzak bears the burden of proving mitigating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std.

1.2(e).)[9] To establish his good character as a mitigating circumstance, Dydzak presented testimony from two former clients. (Std. 1.2(e)(vi).) He also introduced into evidence declarations from nine individuals (two attorneys, four clients, and Dydzak's mother, brother, and wife). However, the value of their statements is reduced for lack of specificity that they adequately understood the nature of Dydzak's current wrongdoing and/or the extent of his prior record of discipline. Therefore, we find this factor is entitled to minimal weight in mitigation.

B. AGGRAVATION

The State Bar bears the burden of proving aggravating circumstances by clear and convincing evidence. (Std. 1.2(b).)

1. Prior Record of Discipline

Dydzak has been previously disciplined four times, which is an extremely serious aggravating circumstance. It is all the more so because certain aspects of Dydzak's present misconduct echo his prior misconduct, particularly his failure to communicate and his abdication of responsibility to clients. (Std. 1.2(b)(i).)

2. Multiple Acts

We have found Dydzak culpable of numerous counts of misconduct in four separate matters. Such multiple acts of misconduct constitute an aggravating circumstance. (Std. 1.2(b)(ii).)

3. Significant Harm

Dydzak's misconduct caused significant harm in two separate client matters. The Cofields had to hire two attorneys at a total cost of $18,000 to set aside the dismissal of their case. Thronson not only lost her cause of action against Trader Joe's, she lost the opportunity to

[9] All further references to standards are to this source.

be reimbursed approximately $2,800 for her medical expenses, which the insurance company initially offered but which Dydzak told her to reject in favor of filing a lawsuit. (Std. 1.2(b)(iv).)

4. Dishonesty and Overreaching

The hearing judge was unwilling to consider as aggravation that Dydzak's misconduct was surrounded by bad faith, dishonesty, and concealment under standard 1.2 (b)(iii). The judge deemed it duplicative of the facts relied upon in establishing Dydzak's culpability for moral turpitude. We agree. (See, e.g., *In the Matter of Chesnut, supra,* 4 Cal. State Bar Ct. Rptr. 166, 176.) However, standard 1.2 (b)(iii) also proscribes overreaching, which we find here as aggravating conduct due to Dydzak's attempt to renegotiate his fee agreement with the Cofields by threatening to withdraw a year and a half after commencing litigation on their behalf. (*In the Matter of Shalant* (Review Dept. 2005) 4 Cal. State Bar Ct. Rptr. 829, 837-838 [coercive renegotiation of fees after commencement of trial constituted moral turpitude].)

5. Lack of Insight and Remorse

Dydzak fails to demonstrate any remorse for his wrongdoing and instead continues to assert that his clients and others are responsible for his misconduct. (Std. 1.2(b)(v).) This is a significant factor in aggravation. During the past decade, he has been disciplined four times, yet, incredibly, he complains in his brief on appeal that "[p]rior to this proceeding no [State] Bar attorney nor the Enforcement Unit [of the State Bar] ever explained to Dydzak the he could risk disbarment or severe discipline if there were disciplinary proceedings in the future against him."

"The law does not require false penitence. [Citation.] But it does require that the respondent accept responsibility for his acts and come to grips with his culpability. [Citation.]" (*In the Matter of Katz* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 502, 511.) Dydzak has failed to do this.

IV. DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession and to maintain the highest possible professional standards for attorneys. (Std. 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.) In determining the appropriate level of discipline, we look to the standards for guidance, although we do not apply them in a talismanic fashion. (*In the Matter of Van Sickle* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) We also look to decisional law for additional guidance. (*Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.)

Standard 1.6(a) provides that, when two or more acts of misconduct are found in a single disciplinary proceeding and different sanctions are prescribed for those acts, the recommended sanction is to be the most severe of them. The most severe standard applicable here is standard 1.7(b), which provides that the degree of discipline for an attorney with two or more prior records of discipline shall be disbarment unless the most compelling mitigating circumstances clearly predominate.

We recognize that despite the unequivocal language of standard 1.7(b), disbarment has not been imposed in every instance where a respondent has a prior history of two or more disciplines. But we generally follow standard 1.7(b) where there is a "repeated finding of culpability of the same offense, or continuing misconduct of increasing severity." (*In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229, 241.)

We can find no justification here for a departure from standard 1.7(b). Dydzak seriously compromised the rights of his clients and engaged in acts of moral turpitude, including making significant misrepresentations to his clients. His misconduct is extremely serious and threatens the public because it has not only continued unabated during his decade-long involvement with the State Bar disciplinary system, but it has been increasing in severity.

The reasons for our disbarment recommendation in *In the Matter of Shalant*, *supra*, 4 Cal. State Bar Ct. Rptr. at p. 842 apply equally here: "Respondent's extended history of inattention to his fiduciary responsibilities to his clients, together with his failure to learn from his past misdeeds, creates a grave risk that additional harm will result to his clients. Furthermore, respondent's manifest indifference to the consequences of his actions and the absence of any significant mitigation evidence compel [this court] to conclude that . . . . [¶] . . . disbarment [is] necessary to best serve the goals of attorney discipline in this case." (See also *Morgan v. State Bar* (1990) 51 Cal.3d 598; *In the Matter of Thomson* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 966.)

V. RECOMMENDED DISCIPLINE

The court recommends that **DANIEL DAVID DYDZAK** be disbarred from the practice of law in the State of California and that his name be stricken from the roll of attorneys admitted to practice in this state.

VI. RULE 9.20 AND COSTS

The court also recommends that Daniel David Dydzak be ordered to comply with the requirements of rule 9.20 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this proceeding.

The court also recommends that costs be awarded to the State Bar in accordance with section 6086.10, such costs being enforceable both as provided in section 6140.7 and as a money judgment.

VII. ORDER OF INACTIVE ENROLLMENT

Because the hearing judge recommended disbarment, he properly ordered that Daniel David Dydzak be involuntarily enrolled as an inactive member of the State Bar as required by

section 6007, subdivision (c)(4), and Rules of Procedure of the State Bar, rule 220(c). The hearing judge's order of involuntary inactive enrollment became effective on August 8, 2008, and Daniel David Dydzak has remained on involuntary inactive enrollment since that time and will remain on involuntary inactive enrollment pending final disposition of this proceeding.